Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

DANIEL ENRIGHT,

*Petitioner,*

*v.*

UNITED STATES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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70 pp

## QUESTIONS PRESENTED

I. Where Petitioner Enright was specifically charged with the "willful and knowing evasion of excise taxes due and owing from PetroPlus [his company]," was it proper for the jury to be instructed that "it is not required that you find that a particular defendant knew who was the taxpayer."

II. Where Petitioner Enright was specifically charged with a wire fraud scheme to knowingly and willfully conceal PetroPlus motor fuel taxes from the State of New Jersey, was it proper for the jury to be instructed that petitioner could be convicted without any evidence either that PetroPlus was in fact the taxpayer, or that Enright knew that PetroPlus was the taxpayer?

III. Where Petitioner Enright's oversized appeal briefs spend at least twenty full pages explicitly citing, quoting, and then arguing from a long line of Circuit and Supreme Court cases discussing the proper jury instruction defining "knowing and willful," was he deprived of due process where the hastily written decision affirming his judgment and 200 month sentence falsely asserts that Enright "cites no legal authority in his two-paragraph analysis on this issue."

IV. Where a Circuit decision flatly contradicts the prior and repeated pronouncements of this Court and even many decisions of the Circuit itself on the issue of what constitutes "know-

ing and willful" tax evasion and fraud, is such a palpably incorrect decision deemed less worthy of review by this Court where the Circuit designates it as "not-precedential"?

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## OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit affirming the District Court's Judgment and Conviction is found in the Appendix ("App.") 1-23. The Order denying the rehearing is found at App. 24-25.

## JURISDICTION OF THIS COURT

The decision of the Court of Appeals and its judgment were entered on April 18, 2002. (App. 22-23.) A timely petition for rehearing was denied May 14, 2002. (App. 24-25.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254. The District Court had jurisdiction under 18 U.S.C. § 3231.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes involved are title 18 U.S.C. §§ 371, 1343 and 1957; and title 26 U.S.C. §§ 4091-93 and 7201. Enright herein makes Fifth and Sixth Amendment challenges to his conviction. Because of their combined length, the relevant constitutional and statutory provisions are set forth at App. 26-31. [Supreme Court Rule 14(1)(f).]

## STATEMENT OF THE CASE

### A. Overview Of The Charges, Enright's Defense, And The Jury Instructions At Issue

Enright's company, PetroPlus, bought motor-fuel from sellers which, he honestly testified, he believed had not paid their federal and state excise taxes due on that fuel. The indictment charged that because they had not paid their taxes, the taxes shifted to his company (PetroPlus) by operation of law. Having made PetroPlus the taxpayer by legal fiction, the government charged that his failure to pay those taxes, which he did not think he owed, became the "knowing and willful evasion of PetroPlus taxes." The 14 federal tax evasion counts specifically charged Enright with the "willful and knowing evasion of federal excise taxes due and owing from PetroPlus." As the Third Circuit opinion noted:

> . . . the wording found in the conspiracy count and all the evasion counts: [defendants] knowingly, willfully, and unlawfully evaded and defeated the federal excise taxes due and owing from PetroPlus to the United States.

(App. 11) (emphasis in original). The state-tax based, wire-fraud charges were identically characterized. (App. 14, text and n.3.)[1]

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[1] While state taxes are not the business of the federal government, it charged that the evasion of state taxes and

We emphasize that the indictment charged evasion only of PetroPlus taxes. As the Circuit Court noted, it was "the government's theory that PetroPlus was the taxpayer." (App. 14.) As the District Court had earlier likewise noted: "the government's case is it's all tax free until it's down to PetroPlus." (JA 2608.) ["JA" refers to the Joint Appendix filed with the Third Circuit.]

Petitioner Enright's defense to these charges had two parts: (1) PetroPlus did not in fact owe the federal or state taxes under the applicable laws because the companies from which PetroPlus purchased the motor fuel, not PetroPlus, were the taxpayers, and (2) even if PetroPlus was somehow deemed the taxpayer, petitioner Enright certainly did not know it and thus he could not have "knowingly and willfully" evaded such taxes.

While the district court noted Enright's defense and professed that "I believe, ultimately, state of mind will be everything here" (JA 1644), it "ultimately" read the specifically charged state of mind out of the case by telling the jury that:

> Although, as I previously instructed, you must find beyond a reasonable doubt that PetroPlus owed unpaid taxes, it is not required that you find that a particular defendant knew who was the taxpayer.

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sending the proceeds by wire-transfer was federal wire fraud and money laundering.

(App. 7.) The District Court refused to give the following instruction which Petitioner Enright requested:

> If a defendant subjectively believed that PetroPlus did not have to report these transactions on its Form 720 or remit the taxes to the IRS, then he/she is not guilty of tax evasion.

On appeal, Enright's challenge was that the court's jury instructions were error, since the federal and state charges both were that Enright had "knowingly and willfully evaded PetroPlus taxes." He thus had to know they were owed to be convicted, and the jury was specifically told the opposite.

### B. The Third Circuit Decision

The Third Circuit held that even though the indictment charged the "knowing and willful evasion of PetroPlus taxes" (App. 8) and only those taxes:

> Enright is incorrect that the government had to prove that Enright knew that PetroPlus owed the taxes at issue . . . Among other things, what the government had to prove was that PetroPlus was the taxpayer, not that Enright knew that PetroPlus was the taxpayer.

* * *

> . . . the government did not need to prove that Enright, (or any of his co-conspirators) knew the identity of the taxpayer in order to establish willfulness. The belief that someone other than PetroPlus owed the taxes did not constitute a defense to the crimes charged . . ."

(App. 8-9)(emphasis added). As to the parallel state-tax based wire-fraud charges, the Third Circuit reiterated the foregoing holding by stating that: "our analysis . . . applies equally to both Enright's arguments, federal and state." (App. 14, n.3.)

As shown further below, under "Reasons for Granting The Writ," this Third Circuit opinion radically alters the meaning of "knowing and willful," the often-times central question in criminal tax and fraud cases. This issue is so common in tax and fraud cases that the mistake below is surely to recur in the Third Circuit unless corrected by this Court.

The Opinion below ignores the key authority. It does not mention, much less discuss, the many relevant cases cited to it by all the parties, including this Court's often-cited decision in *Cheek* v. *United States*, 498 U.S. 192, 202 (1991), holding that, in criminal tax cases, "the issue is whether . . . the government has proved that the defendant was aware of the duty at issue." (emphasis supplied). It likewise fails to even mention the many Third Circuit opinions following *Cheek*.

Not only did the opinion ignore the controlling case law, it ignored Enright's brief. The opinion falsely asserts twice that:

> Enright argues that the district court improperly charged the jury on knowingly and willfully. He cites no legal authority in his two-paragraph analysis on this issue.

(App. 6 and again at App. 14, n.3.)

Yet as fully documented further below, at pp. 22-25, Enright's briefs were chock-full of cases citing, quoting, and arguing at length from the Circuit and Supreme Court cases discussing that very issue. Failure to see any of the key parts of the brief reflects at best a sad lack of judicial concern for precedent. This should not be considered less serious simply because of the opinion's self-designation as "non-precedential," a seeming attempt to sweep itself under a rock. As the late Justice Brandeis wrote: "Sunlight is said to be the best of disinfectants." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 304 (1964). This case deserves some of that exposure.

### C. The Trial

While state of mind is quite frequently the key issue in tax evasion and fraud cases, it is more than usually so in this case given the complexity of the tax laws (App. 30-31) involved relating to the motor fuel sales which were at the

heart of this case. The tax laws involved thus warrant some discussion. [2]

### 1. The Federal Motor Fuel Taxes

PetroPlus, itself a motor-fuel wholesaler, purchased motor fuel from wholesalers or producers and then resold it to end-users. Since the indictment charged that PetroPlus was the taxpayer, the initial question at trial was who owed the tax. Even though motor-fuel was normally bought and sold by wholesalers many times before it reaches the end user, the motor-fuel excise tax is a one-time tax.[3] The only taxable event (i.e., the only taxable sale) occurred whenever a wholesaler sold to an end user, or to another wholesaler (such as PetroPlus) where the seller to PetroPlus assumed the tax responsibility by itemizing on its invoices the federal and state excise taxes as having been included in the sale price. When such a tax-paid declaration was made to PetroPlus by it seller, Enright believed, and there

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[2] The tax laws are also worth discussing because not only Enright, but according to the district court a "tidal waive" of motor-fuel sellers did what Enright did.

[3] Where a wholesaler/producer makes tax-paid sales of motor fuel, "such sales were known as 'tax included' or 'tax paid' transactions. Subsequent sales of the same gasoline were exempt because the one-time excise tax had been paid." *United States* v. *Macchia*, 35 F.3d 662, 665 (2nd Cir. 1994).

was law to support his belief, that his company PetroPlus was not the taxpayer.[4]

Recognizing that PetroPlus would not normally be considered the taxpayer where it purchased the motor fuel along with a certification that the tax had been paid, the government argued that since the sellers to PetroPlus had falsely certified that the taxes had been paid, and Enright knew this, the tax-paid sales to PetroPlus were "shams" to be disregarded. *Ipso facto*, by this logic, PetroPlus' subsequent sales of the fuel to its customers became the first, "real"[5] taxable sales, making PetroPlus the taxpayer.

### 2. The State Tax Charge

New Jersey also imposed one-time taxes on the first seller "who knew in advance that the product was destined for highway vehicles." (Indictment, JA 239.) The evasion of PetroPlus state

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[4] *See Cook Oil Co.* v. *United States*, 919 F.Supp. 1556, 1563 (D. Ala. 1996) (holding that "an intermediate company who purchased tax-paid fuel was not the person who paid the tax, but a purchaser from that person.").

[5] The Third Circuit notes that this "sham" doctrine allows the fact finder to "look instead to its [the transaction's] economic reality for the purpose of imposing the proper tax on the appropriate party or parties." (App. 7.) But it ignored Enright's plea that even the district court noted that "all of these transactions were not sham transactions. . . . [they] were real transactions in the sense that oil on the most part moves. . . ." (JA 2418.) Of course, the "sham doctrine," even where applicable, does not excuse the government from the heretofore well-settled burden of proving that Enright knew PetroPlus was the taxpayer.

taxes were the clearly charged object of the scheme. As the Superseding Indictment alleges:

> DANIEL ENRIGHT, and others, both known and unknown to the Grand Jury caused PetroPlus to file . . . New Jersey Motor Fuels Special License "B" Monthly Tax Returns, and New Jersey Petroleum Gross Receipts Tax Returns which falsely reported transactions of Motor Fuel.

(JA 257) (emphasis added). As the Third Circuit noted, the Indictment charged "PetroPlus as the 'State of New Jersey' taxpayer, as well." (App. 14, text and n.3.)

### 3. Enright's Defense And Testimony

At the outset of the trial, the District Court told the parties that: "I believe, ultimately, state of mind will be everything here." (JA 1644.) It also noted from the beginning Petitioner Enright's "continuing drumbeat in an effort to get me to give a *Cheek* charge early in the case." (JA 1652),[6] referring to such a charge as "the one pro-defense, call it pro-defense charge." (JA 1546.) While not wanting to give the *Cheek* instruction during the trial as Petitioner Enright had re-

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[6] *Cheek* v. *United States*, *supra*, 498 U.S. 192, 202 (1991).

quested many times, the court did promise to give it ultimately.[7]

With state of mind thus a crucial issue and with the court's promise to give the *Cheek* instruction at the end of the trial, Enright testified that he knew, and that virtually the entire industry knew, that sellers of tax-paid fuel to his company (and to many others) were not paying their federal and state taxes even though their invoices stated that their price included those taxes. However, he also testified that he did not believe that because his supplier had cheated on its tax obligations, this made PetroPlus the taxpayer.

He further pointed out that even the IRS tax investigators had believed that the company selling to him, King's Motor Oil ("Kings"), was the taxpayer. The District Court agreed with this, noting that "there's no question that the [IRS] fraud referral referrers believed Kings was the taxpayer." (JA 2363.) More importantly, so did Petitioner Enright, who testified that on all of the sales involved, he listed all of the details (amounts, dates of sale, sellers, etc.) on his tax return, thus making them easily traceable by the

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[7] As the District Court promised at the beginning of the trial:

> Cheek will tell them what state of mind they must find . . . I am not going to isolate the Cheek charge. I am not going to hand to the jury the defense theory of the case early on. I will instruct the jury at the end of the case as to the legal standards they must find. Cheek will be part of that . . .

(JA 1652-54.)

IRS. He also testified that he alerted the IRS through five separate letters of his concerns that he did not want his company to incur tax liability because his sellers may not have paid their taxes. As he testified:

> The issue throughout this whole situation was . . . whose problem is it, would it come back to haunt my company [PetroPlus]. My mission was . . . to get assurances that we are on solid legal ground which I got. I was told [by the IRS] . . . get a tax certification . . . Anyone in this business would absolutely have to be insane to buy tax paid without having the belief that if there was a tax problem, it would not come back to the buyer."

(JA 2470.)

At the end of the trial, after Petitioner Enright had given the just-quoted testimony, the Court observed that the state-of-mind issue had been "clearly joined." (JA 2582.) It correctly stated the government's contention "that the government has to prove that PetroPlus was the taxpayer but doesn't have to prove that any particular defendant knew that PetroPlus was the taxpayer." (JA 2582.) Just as clearly, it noted Petitioner Enright's contrary position that "the government has to prove that anybody charged knew, in the Cheek sense knew, that PetroPlus was the taxpayer, and the rest of the elements of the offense." (JA 2582.)

It then lowered the boom, yanking from the case the state-of-mind issue as charged in the indictment. It did so by telling the jury that "it is not required that you find a particular defendant knew who was the proper taxpayer." (App. 7.) This ruling was a noose. At sentencing, the district court remarked:

> His own testimony when he took the stand, I think the word shocking may be the only word I could think of. It was stunning . . . because you can convict him out of his own words . . . Mr. Enright got on the stand and admitted he knew that the taxes were not being paid.

(JA 2624.) It was really not shocking. Instead Enright's testimony was the truth and would have been a defense to a properly instructed jury.

The District Court, ignoring the charging language (chosen by the government) that "Enright knowingly and willfully evaded PetroPlus taxes,"[8] simply did not like the conduct it saw in

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[8] The state tax charges were treated the same. The District Court refused to tell the jury that the government must prove that Petitioner Enright knew his company was the state taxpayer. Indeed it even refused to tell the jury that the government had to prove that PetroPlus was the state taxpayer. To Petitioner Enright's repeated plea that "from day one, Your Honor, the original thing [Indictment] was PetroPlus is the taxpayer, it's PetroPlus' duty," (JA 2474-75) the District Court ruled that the wire-fraud charges did not require any proof that PetroPlus owed the taxes: "I don't find the change from naming PetroPlus to saying nobody . . . is a material change . . . It doesn't come even close." (JA 2477.) It sarcastically added: "Eight angels on the head of a pin is a sub-

this case and said so. The evidence in this case was that, from 1989 to 1993, there had become a very large, "tax-paid" market in which many wholesalers like PetroPlus bought motor fuel at a discount from companies which were the taxpayers under the state and federal tax laws but which had not paid those taxes as required. This allowed Petitioner Enright's company, and many other wholesalers operating similarly, to purchase the motor fuel for less, and thus in turn sell for a lower price and thus be able to compete in this "tax paid" market." Describing this practice as a "wave," a "tidal wave," and an "invasion," and finding that "there was a whole lot of people doing this thing . . . from New York to New Jersey to Pennsylvania to Delaware or wherever," (JA 1683), the District Court declared its enmity for this "invasion," called it "criminal" (JA 1683), and stated:

> It's like buying a Sony color TV for $30 from the back of the truck. You know if someone is selling a $30 TV from the back of a truck, listing for $800 there is a problem.

(JA 2659.) This was its justification for ignoring the "knowing and willful" allegations. The problem, we contend, is that the indictment did not charge that Enright aided and abetted the tax cheating of others. It alleged that he knew PetroPlus was the taxpayer and willfully chose not to

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stantive change from 9, I guess." (JA 2474.) The cases cited below attach more significance to the matter. See below.

pay PetroPlus' taxes. That charge was never submitted to the jury.

## REASONS FOR GRANTING WRIT

### I. Conflict With Other Decisions

#### A. Conflict With *Cheek* v. *United States*

If the supervisory powers of this Court were not already firmly in place, the opinion below would surely have prompted their creation. The opinion below is very wrong indeed unless all the other cases upholding a very different definition of criminal *mens rea* themselves are now to be ignored. The criminal defendants chose to go to trial in this case on the basis of a heretofore settled definition of what constitutes "knowing and willful" conduct. At the end of that trial they (and their families) watched as that definition went out one door, and they another. Precedent should not be treated so lightly.

The Third Circuit did not even mention, much less follow, this Court's prior decision in *Cheek* v. *United States, supra*, 498 U.S. 192 (1991). In *Cheek*, the taxpayer/defendant testified that he had not acted willfully as charged because he believed that "wages" were not income under the Constitution. He was convicted after the District Court instructed the jury that "an honest but unreasonable belief is not a defense and does not negate willfulness." *Cheek*, 498 U.S. at 197. Re-

versing, this Court held that: "In the end, the issue is whether, based on all the evidence, the government has proved that the defendant was aware of the duty at issue." *Cheek*, *supra*, 498 U.S. at 202. As *Cheek* commands, even a subjectively unreasonable belief, if actually held, is enough to acquit, no matter if the taxpayer (in *Cheek*) is a kook with a kooky notion about tax obligations.[9]

Petitioner Enright's belief, that PetroPlus was not the taxpayer because its supplier Kings was the taxpayer, was not only infinitely better grounded than the *Cheek* defendant's silly notion that "wages" are somehow "not income," it was also true according to the IRS authorities investigating this matter. As the district court noted, "the [IRS] fraud referral referrers believed Kings was the taxpayer." (JA 2363.) Moreover, the District Court specifically noted that:

> if the government had to prove that [Enright] knew that PetroPlus was the taxpayer, that has Rule 29 implications . . . .

(JA 2582.) It later repeated, in the same context, that "I probably would have changed my mind at the Rule 29." (JA 2606.)

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[9] *See also, Ratzlaf* v. *United States*, 510 U.S. 135, 141, 114 S.Ct. 655, 659, 126 L.Ed.2d 615 (1994), where, quoting *Cheek*, this Court reiterated that "decisions involving these provisions describe a 'willful' actor as one who violates "a known legal duty," and "willfulness . . . consistently has been read by the Courts of Appeal to require both knowledge of the reporting requirement and a specific intent to commit the crime."

The "duty charged" *Cheek, supra*, was "the knowing and willful evasion of PetroPlus taxes." It was therefore at odds with *Cheek*, and completely dismissive of Enright's legitimate, *Cheek*-based defense, for the Third Circuit to have held that "Enright is incorrect that the government had to prove that Enright knew that PetroPlus owed the taxes at issue . . ." (App. 8.)

### B. Conflict With Circuit Decisions

While numerous Third Circuit decisions before Enright's follow *Cheek's* rationale,[10] one such case is so similar to Enright's that it is nothing less than dumbfounding that the Third Circuit did not even mention it, but instead falsely asserted that Enright had not mentioned it. *See, United States* v. *Schramm*, 75 F.3d 156, 162 (3rd Cir. 1996). In *Schramm*, defendant was charged with a mail-fraud scheme "to evade and defeat full payment of the fuel use tax imposed on the sale of diesel motor fuel under the laws of the Commonwealth of Pennsylvania." *Id.* at 160 (emphasis added). He was convicted. The Third Circuit reversed because, while the indictment quite specifically charged a conspiracy with the object of willful "evasion of Pennsylvania's Fuel Use Tax," *Id.*, the district court had improperly instructed

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[10] *See, United States* v. *Wexler*, 31 F.3d 117, 129 (3rd Cir. 1994), citing *Cheek*, ("the issue is whether, based upon all of the evidence, the government has proved that the defendant was aware of the duty at issue."); *See also, United States* v. *McGill*, 964 F.2d 222, 237 (3rd Cir. 1992).

the jury that it could convict defendant if they found that he had conspired to defraud Pennsylvania out of any motor-fuel tax, such as the wholesale tax, even if such tax had not been charged in the indictment. In reversing, the *Schramm* court explained:

> . . . the evidence must establish that the defendant entered into an agreement and "knew that the agreement had the specific unlawful purpose charged in the indictment.

*Id.* at 162. *Schramm* concluded with an observation that the Enright panel ignored:

> If the government had intended to charge DeCello with agreeing to participate in a scheme to violate Pennsylvania's wholesale tax as well, it easily could have, and certainly should have, done so.
>
> * * *
>
> By not specifying the evasion of . . . Pennsylvania's wholesale fuel tax as one of the goals of the conspiracy in paragraph 18(b), the indictment failed to apprise DeCello "with reasonable

> certainty, of the nature of the accusations against him."

*Id.* at 164.[11]

Just as in *Schramm*, the government could have charged Petitioner Enright differently, for example, by charging that he aided and abetted or conspired with others to avoid their taxes, or to hide the tax obligation generally. But it did not do so. Having elected (unilaterally, in the privacy of its grand jury room) to pin its case specifically on the "knowing and willful evasion of PetroPlus taxes," the government must be required to prove that state of mind. This easy logic was ignored.

Ignoring its own precedent (*Schramm, supra*), the Enright panel chose (App. 12-13) to rely instead on the Fifth Circuit decision of *United States* v. *Wisenbaker*, 14 F.3d 1022 (5th Cir. 1994). Yet *Wisenbaker* makes the very point made in *Schramm* and certainly does not justify ignoring the state of mind charged in Enright's indictment. Defendant in *Wisenbaker* was charged with and convicted of excise tax evasion on proof that he failed to pay excise taxes even though his

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[11] Such a switch is an impermissible variance, violating due process. *See, Stirone* v. *United States*, 361 U.S. 212 (1960) (holding that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself."). Altering the "knowing and willful" state of mind from specifically evading "PetroPlus taxes" to "anyone's taxes," equally violates the Sixth Amendment right to have all elements of the offense fully presented to the jury. *United States* v. *Gaudin*, 515 U.S. 506, 522-23 (1995). *See also, Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), (submission to the jury of each element of the crime involves "constitutional protections of surpassing importance," *Id.* at 2355-56.)

"invoices to some of the retailers represented that the price he charged them included the required federal and state excise taxes" *Id.*, at 1024. On appeal, defendant argued that since "the indictment charged him only with evading his own taxes, . . . proof that he had assisted others in evading their taxes constituted an amendment or variance." *Wisenbaker, supra*, 14 F.3d at 1026. The Fifth Circuit rejected this argument only because "Wisenbaker is charged not only with evading his own taxes, but also those of his customers." *Id.*, at 1025. (emphasis added). It further held that:

> The indictment contains no terms restricting it to an allegation that Wisenbaker failed to pay his own taxes. It fairly encompasses the government's theory that Wisenbaker also violated I.R.C. § 7201 by evading any taxes his customers owed.

*Id.* at 1027 (emphasis added). Petitioner Enright's superseding indictment contains the very restriction noted as missing by the *Wisenbaker* court, since Enright was charged only with "knowing and willful failure to pay taxes due and owing from PetroPlus." *Wisenbaker* is thus in harmony with *Schramm* and fully supports Enright's position.

Nor can the improper jury instructions sustained by the Third Circuit be rescued by the general observation that "willfulness may be inferred." (App. 10.) Whatever general willfulness

may be inferred by certain actions, the specifically charged "knowing and willful evasion of taxes due and owing from PetroPlus" simply was not submitted to the jury and thus was not something the jury was ever asked to infer.

Instead the jury was specifically told on the federal counts that it need not find that Enright knew PetroPlus owed the taxes. On the state counts, the court went further, telling the jury that it need not even find that PetroPlus owed the state taxes.

### C. The Issue Is Likely To Recur Frequently

The District Court told the parties below that "state of mind is everything here." (JA 1644.)[12] That is true in virtually all criminal tax and fraud cases going to trial in the federal system. Thus this issue will recur, and this Court should accept this case to determine whether the approach taken by the Third Circuit in Enright's case should endure.

At least in the Third Circuit, the charging language of the indictment can now be freely ignored and the defendant convicted of a knowing and willful tax violation other than the one

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12 "In a criminal tax proceeding, the concern is not over the type or the specific amount of the tax which the defendant has evaded, but whether he has willfully attempted to evade the payment or assessment . . ." *United States* v. *Miller*, 545 F.2d 1204, 1214 (9th Cir. 1976). The same can also be said about fraud cases.

charged. This can happen again even where, as here, the trial court agrees that defendant did not know of the tax obligation he is alleged to have knowingly violated. Unless corrected, this tolerance of theory-switching will surely tempt prosecutors in any case where they find, mid-trial, that they are having difficulty proving what they chose to charge. That temptation alone invites repetition of the instructional error occurring in this case. It likewise invites this Court's review.

### D. The Third Circuit Failed In Its Basic Duty To At Least Read Enright's Briefs

Denial of a full direct appeal strikes at "the adversary process itself" and renders it "presumptively unreliable." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1035, 1038 (2000). Such an appeal cannot be had where the appellate court has not read the briefs. Yet the Third Circuit opinion declares that whoever wrote the opinion below did not read Enright's brief or, if it was scanned, the key parts were missed. The opinion unreservedly states that on the knowing and willful issue, Enright "cites no legal authority in his two-paragraph analysis on this issue." (App. 6.) It just as falsely makes the very same assertion about Enright's variance argument addressing the government's end-of-trial switch of the wire-fraud charges from scheming to defraud New Jersey of "PetroPlus taxes," to "anyone's taxes." (App. 14, n.3.)

This is an outrage to the parties and should greatly concern this Court. In the first place, before the briefs below were filed, the four convicted appellants (whose appeals were consolidated below) were allowed oversized briefs (50% longer than normal) to cover the complex issues arising from this long trial. In allowing this, the Third Circuit admonished the four appellants to divide the issues between them for briefing purposes so as to avoid repetition. Enright, as it informed the panel at the beginning of the oral argument, assumed the burden for all appellants of briefing the instructional issues relating to "knowing and willfulness," and all other appellants adopted his arguments by reference.

It is nothing less than absurd to assert, as the Third Circuit clearly twice does, that Enright would then spend just "two paragraphs" of his 91-page brief on this central point, or that the other appellants would have tolerated such abandon had he in fact done so. In fact, his briefs centered on this issue. See, Enright's Opening Brief, which spent much of the introduction discussing the procedure and the charges which framed this issue. More particularly, see pp. 23-27, "The Wilfulness Instruction Given Ignored the Identity of the Taxpayer," See also, pp. 64 through 68 of his Opening Brief, "The Wilfullness Instruction Was Fatally Flawed," citing and quoting from nine separate Circuit or Supreme Court cases. See also, Reply Brief, which generally discusses the issue throughout and see specifically, at pp. 15-18, "The Willfulness Instruction Was Improper,"

citing and quoting from five Circuit and Supreme Court cases.

Moreover, as shown by the official Court tape-recording thereof, virtually the entire oral argument was devoted to this issue, with counsel making explicit references to some of the cases cited in his briefs on willfulness. For example, in Enright's counsel's opening argument to the panel he went straight to the citations in Enright's brief on the "knowing and willful" issue:

> Yes, your honor, I would like to start by referring the Court to the case of *United States* v. *Schramm*, which is cited at page 62 of our opening brief.

(Oral Argument Tape.)[13] Appellant counsel also repeatedly mentioned that same brief's discussion of the *Cheek* decision and other cases discussing the knowing and willful issue.

After counsel for appellant concluded his argument, the prosecutor was asked rather pointedly about the issue. At the conclusion of her argument, the panel expressed such concern about the fairness of the wording of the knowing and willfulness instruction that it directed the government to file a post-hearing letter brief on the issue. Enright's ten-page Reply, filed March 22,

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13 This comment of counsel is transcribed from the official tape recording of the oral argument in this case, held on March 8, 2002 and available for full review, which, we would be pleased to submit if this Court wishes. Listening to the full argument simply shreds the Opinion's assertion that cases were not cited.

2002, devoted itself substantially to the failure of the willfulness instruction, and cited and quoted from eight, separate Circuit or Supreme Court decisions on the "knowing-and-willful" issue. Given all this, something is very wrong here.[14]

Just 27 days after receipt of the final briefs, the Third Circuit states that Enright "cites no legal authority" (App. 6 and 14, n.3.) on either his "knowing and willful" or variance arguments. Indeed the opinion goes so far as to charge that the failure to cite any authority is a violation of Fed. R. App. P. Rule 28(a)(9)(A). *Id.* It is simply not comprehensible for this allegation to have been made. Our discussion of the case law was extensive. Many people were sentenced on judgments entered on the faulty instructions affirmed by the decision here challenged. None had any prior criminal record. In combination, the sentences involved stolen decades from their lives. (Enright alone was sentenced to 200 months.) Our point on appeal was genuine and accompanied by a painstaking analysis of the case law.

No decision should be allowed to stand which, for whatever reason, sweeps away serious arguments fully made by the simple expedient of falsely stating that they were never argued. The

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[14] It is just as untrue (App. 14, n.3) that Enright's brief spent only two paragraphs on the variance issue. Enright's Opening brief pp. 69-79, citing, quoting, and arguing from five Circuit or Supreme Court cases relating to this variance issue; see also Enright's Reply, at pp. 23-33, citing, quoting and arguing from four Circuit and Supreme Court decisions. See also, Enright's post-hearing letter brief, filed March 22, 2002, at pages 7-10, arguing the point again with references back to the cases cited, quoted and argued from in Enright's earlier briefs.

Third Circuit should be required to address it's holding in the light of *Cheek*, *Schramm*, and the many other cases Enright cited in support of the argument that the instructions were flawed.

### E. The "Not Precedential" Designation Should Not At All Diminish Certworthiness Here

This case is worthy of review, published or not. Initially, on this matter, we note the following comment:

> The fact that the Court of Appeals opinion is unpublished is irrelevant. Non-publication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.

*Smith* v. *United States*, 502 U.S. 1017, 112 S. Ct. 667, 669 (1991) (Justices Brennan, O'Connor, and Souter, dissenting from a denial of certiorari). The decision challenged here clearly "lingers" as the current thinking of the Third Circuit, particularly if this case was designated "not-precedential" for the accepted reason, namely that it is an unremarkable reiteration of settled law.[15]

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15 "Lack of publication usually reflects the Court's belief that the dispute is one-sided, sapping the disposition of pre-

If that is the current view of the Third Circuit, this case is surely in need of further scrutiny since it jettisons significant precedent.

Moreover, the Third Circuit has signaled that it will indeed use "not-precedential" decisions in deciding future cases:

> As appellants correctly note, our decision in Woods is unpublished . . . . However, because of the case's factual similarity to that before us, we look to the decision as a paradigm of the legal analysis we should here follow.

*Drinker* v. *Colonial School District*, 78 F.3d 859, 865, n.12 (3rd Cir. 1996). Indeed, the Third Circuit's use of unpublished opinions seems almost routine. *See, Bromwell* v. *Michigan Mutual Ins. Co.*, 115 F.3d 208, 213 (3rd Cir. 1997) (citing to a Tenth Circuit unpublished opinion); *see also, Aetna Life & Casualty Corp.* v. *Maravich*, 824 F.2d 266, 269 (3rd Cir. 1987) (following an unpublished opinion having similar facts).

Finally, it should not be considered shopworn to capture, here again, the oft-noted importance of precedent. We thus quote at length the following observation of how such designations cheapen the judicial process:

> Inherent in every judicial decision is a declaration and interpretation of a

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cedential value." *Banker's Trust Co.* v. *Old Republic Insurance Co.*, 7 F.3d 93, 94-95 (7th Cir. 1993).

> general principle or rule of law. *Marbury* v. *Madison*, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L. Ed. 60 (1803). This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. (citations omitted) These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution. Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional.

*Anastasoff* v. *United States*, 223 F.3d 898, 899-200 (8th Cir. 2000), *vacated on other grounds, Anastasoff* v. *United States*, 235 F.3d 1054 (8th Cir. Mo. 2000). The Third Circuit decision here either ignores the lofty but steadfast goal of the Circuit Courts discussed above, or it completely misunderstands the past precedent cited to it, or it did not read the briefs.

However, the precedent was clear. Based upon it, Enright and his counsel decided to go to trial because Enright truly did not believe that PetroPlus was the taxpayer and thus they concluded that the government could not meet its burden to prove that he "knowingly and willfully evaded PetroPlus taxes." Little did they know that, despite legal precedent's lofty purpose and lengthy history of service as a roadmap to criminal defendants deciding their options, it would be ignored by the district court. Even less could they imagine that the Circuit Court would not even read Enright's brief citing that precedent, but instead would accuse him of failing to follow the rule requiring the citation of precedent.

At the oral argument (with tape available) in front of the Third Circuit panel the prosecutor was pointedly asked:

> How did you prove that PetroPlus owed a tax? If you prove that, and you prove that Enright willfully evaded PetroPlus taxes then I see your argument. But where did you prove that Enright willfully evaded PetroPlus taxes? He may have willfully evaded King's or someone elses taxes.

The answer of the prosecutor, which was ultimately adopted as the law by the court below, was as follows:

> Exactly, because the language "due and owing from PetroPlus" was surplusage, which could be ignored.

Yet before the opinion below, the Third Circuit had stood with the other Circuits and with this Court's rulings by repeatedly insisting that the wording of an indictment could not be ignored:

> . . . the evidence must establish that the defendant entered into an agreement and "knew that the agreement had the specific unlawful purpose charged in the indictment. . . . Once charged, the precise manner in which an indictment is drawn cannot be ignored."

*Schramm, supra*, 75 F.3d at 162. *Schramm* is fair. What happened below was not.

## CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A**

**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 99-5144

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UNITED STATES OF AMERICA

v.

DANIEL ENRIGHT,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 95-cr-00388-1)
District Judge: Hon. Joseph E. Irenas

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Argued March 7, 2002

Before: SCIRICA and COWEN, Circuit Judges,
RESTANI*, Judge, United States Court of International Trade

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

(Filed April 18, 2002 )

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OPINION

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COWEN, Circuit Judge

Daniel Enright was found guilty of violating 18 U.S.C. § 371 by conspiring to defraud the United States, to commit tax evasion (in violation

of 26 U.S.C. § 7201), commit wire fraud on the State of New Jersey (in violation of 18 U.S.C. § 1343), and to commit money laundering (in violation of 18 U.S.C. § 1957). He was also convicted of fourteen counts of attempting to evade excise taxes (in violation of 26 U.S.C. § 7201), eleven counts of wire fraud (in violation of 18 U.S.C. § 1343), eleven counts of money laundering (in violation of 18 U.S.C. § 1957), and one count of evading currency reporting requirements (in violation of 31 U.S.C. §§ 5316, 5322). Enright was sentenced to 200 months, and ordered to pay $1,000,000 in restitution. He challenges the sufficiency of the evidence to support his conviction, some of the District Court's evidentiary rulings and jury instructions, as well as his sentence. He also asserts that the District Court improperly allowed an amendment to or variance from the terms of the indictment. We will affirm.[1]

## I.

Enright and his coconspirators participated in a "daisy chain" scheme to evade excise taxes on the sale of certain kinds of fuel. The elements of

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[1] Currently before this Court are four appeals arising from the same trial, of which Enright's appeal is one, *See United States v. Enright*, No. 99-5144; *United States v. Pedroni*, 99-5182; *United States v. Karamanos*, No. 99-5212; *United States v. Erlikh*, No. 99-5281. We granted counsel leave to file oversized briefs in ordered that there be no repetition of issues in the briefs. To the extent issues in this Memorandum Opinion apply to any or all of the other three Appellants in this case, we deem the Appellants' arguments to be without merit and affirm the Appellants' convictions and sentences.

such schemes have been detailed sufficiently elsewhere. *See, e.g., United States v. Morelli*, 169 F.3d 798, 801 (3d Cir. 1999), *cert. denied*, 528 U.S. 820, 120 S.Ct. 63 (1999) (citations omitted). During the prosecution period, Enright operated as the president of Petro Plus Oil ("PetroPlus"), a company that bought and sold fuel at the bottom of the chain. We will add further factual detail below as it becomes necessary to the legal discussion.

Enright was convicted of a multiple-object conspiracy contained in Count One of the Superseding Indictment, along with multiple counts of tax evasion, wire fraud, money laundering, and evading currency reporting requirements.

## II.

### A. Sufficiency of the Evidence PetroPlus Was The Taxpayer

Enright argues that because PetroPlus was not the federal or New Jersey state excise taxpayer, the evasion counts should have been dismissed. When reviewing the sufficiency of the evidence to sustain a conviction, we must ask whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. *See United States v. Veksler*, 62 F.3d 544, 551 (3d Cir. 1995) (citations omitted).

We are satisfied that a rational finder of fact could conclude beyond a reasonable doubt that the government met its burden of proof. A jury could rationally conclude that PetroPlus was responsible for the unpaid federal and New Jersey State excise taxes. The record is replete with evidence of an agreement between Enright and his coconspirators whereby Kings would purchase number 2 oil from a major fuel supplier in a tax-free transaction to be delivered to PetroPlus in subsequent transactions without the taxes ever being paid. This involved an elaborate and complex daisy chain involving fictitious paper sales of the fuel to make it appear that a sham company above PetroPlus in the chain had actually incurred and paid the taxes on the sale of the number 2 oil, when in fact the taxes had not been payed. The record also reflects that PetroPlus then sold the oil at prices that purported to include the federal and New Jersey state excise taxes, when in reality as well known to Enright the taxes had never been payed. The record reflects numerous other examples from the paper trail of the daisy chain.

The jury considered and rejected Enright's claim that PetroPlus did not incur the tax liability. The District Court specifically instructed the jury that, in determining whether the government had proven the attempted evasion of tax charged in the indictment beyond a reasonable doubt, the "first question for you to determine is whether a tax was due and owing from PetroPlus to the United States." App. at 614. It is apparent from

the voluminous record that the trial provided overwhelming evidence from which a rational jury could find beyond a reasonable doubt that PetroPlus incurred the taxes.

## B. Jury Instructions

Enright argues that the District Court improperly charged the jury on knowingly and willfully. He cites no legal authority in his two-paragraph analysis on this issue.[2] "We will reverse the [D]istrict [C]ourt's denial to charge a specific jury instruction only when the requested instruction was correct, not substantially covered by the instructions given, and was so consequential that the refusal to give the instruction was prejudicial to the defendant." *United States v. Phillips*, 959 F.2d 1187, 1191 (3d Cir. 1992). Our review of whether the District Court stated the appropriate legal standards in its charge is plenary. *United States v. Johnstone*, 107 F.3d 200, 204 (3d Cir. 1997). The jury charge must clearly articulate the legal standards at issue and be structured to avoid confusion, and we examine the charge in its entirety. *Id.*

The District Court charged the jury as follows:

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[2] *See* Fed. R. App. P. 28(a)(9)(A) (explaining that Appellant's brief must contain the legal authorities and citations to the record upon which Appellant relies).

The word "willfully," as used in section 7201, means a voluntary, intentional violation of a known legal duty. Under section 7201, a defendant has a legal duty not to act to evade a tax obligation. Thus, to find a defendant guilty, you must find that the Government has proven that he or she acted voluntarily and intentionally and with the specific intent to keep from the Government a tax imposed by the tax laws that a defendant knew there was a legal duty to pay. An act is done "knowingly" only if it is done purposely and deliberately and not because of mistake, accident, negligence, or other innocent reason.

Although, as I previously instructed, you must find beyond a reasonable doubt that PetroPlus owed unpaid taxes, it is not required that you find a particular defendant knew who was the proper taxpayer. However, you must find beyond a reasonable doubt that a defendant acted voluntarily and intentionally and with the specific intent to keep from the Government a tax imposed by law that a defendant knew there was a legal duty to pay.

App. at 617. Enright is incorrect in his assertion that the government had to prove that Enright knew that PetroPlus owed the taxes at issue. *See United States v. Voigt*, 89 F.3d 1050, 1089-90 (3d Cir. 1996); *United States v. Wisenbaker*, 14 F.3d 1022, 1024-25 (5th Cir. 1994). Among other things, what the government had to prove was that PetroPlus was the taxpayer, not that Enright knew that PetroPlus was the taxpayer. Read in its entirety, the District Court properly charged the jury.

Enright also argues that the following instruction was tantamount to a directed verdict:

> If, in good faith, a defendant believed that he or she was not violating the Internal Revenue laws, then such defendant cannot be guilty of tax evasion.
>
> . . .
>
> The test is whether a defendant personally believed in good faith that all properly reportable excise taxes due under the Internal Revenue Code had been reported and paid.

App. at 620-21. Reviewing the charge in its entirety, we find no error with the instruction. As discussed above, the government did not need to prove that Enright (or any of his coconspirators) knew the identity of the taxpayer in order to establish willfulness. The belief that someone other

than PetroPlus owed the taxes did not constitute a defense to the crimes charged in the superseding indictment.

Enright also challenges the District Court's instruction on sham transactions. The District Court gave the following instruction on sham transactions:

> [I]t is not lawful for parties to conduct transactions which, rather than having any business purpose or economic substance, are conducted solely for the purpose of evading taxes. Therefore, where a transaction is found to have been conducted for the sole purpose of evading tax liability, the Internal Revenue Service is permitted to ignore or reject the form of that transaction, and look instead at its economic reality for purposes of imposing the proper tax on the appropriate party or parties.

App. at 623. Having read the charge to the jury in its entirety, we find no error with the instruction. *See United States v. Wexler*, 31 F.3d 117, 122 (3d Cir. 1994).

### C. Sufficiency of the Evidence Enright Acted Willfully

Enright challenges the sufficiency of the evidence adduced at trial that he acted willfully. We must ask whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. *See Veksler*, 62 F.3d at 551 (citations omitted).

Enright asserts that to show willfulness, the government had to prove that he knew Petro-Plus owed the taxes due on the fuel sales at issue. We disagree with such a theory of the case. Willfulness may be inferred. *See Voigt*, 89 F.3d at 1090. There is ample evidence in the record from which a reasonable jury could infer that Enright acted willfully to evade the taxes. Whether he knew who the ultimate taxpayer should have been is irrelevant. Enright testified that he knew the taxes had not been payed. App. at 621. To further and conceal the tax evasion, Enright and his coconspirators made false entries and alterations in the books and records of the companies involved in the daisy chain, created false invoices and documents, destroyed relevant records, concealed assets, and covered up sources of income. *See, e.g., Spies v. United States*, 317 U.S. 492, 499, 63 S.Ct. 364, 368 (1943); *United States v. Ashfield*, 735 F.2d 101, 105 (3d Cir. 1984). Numerous deceptions exist in the record, along with evidence of Enright's vast experience and tenure

in the oil business. We will not disturb the jury's finding of willfulness.

### D. Constructive Amendment and Variance Issues

Enright argues that the District Court should have acquitted him on the conspiracy and evasion counts because the District Court permitted the government to constructively amend the indictment during trial, a *per se* reversible error. *Stirone v. United States*, 361 U.S. 212, 215-17, 80 S.Ct. 270, 272-73 (1960). In the alternative he argues that the proof adduced at trial varied from the allegations in the superseding indictment such that it would constitute a reversible error. A variance constitutes reversible error only if Enright were prejudiced by the variance. *See United States v. Perez*, 280 F.3d 318, 346 (3d Cir. 2002). We reject both of Enright's theories because they are based on the same misreading of the superseding indictment.

Enright takes issue with wording found in the superseding indictment in the conspiracy count and all of the evasion counts: "knowingly, willfully, and unlawfully evaded and defeated the federal excise taxes *due and owing from PetroPlus* to the United States." (Counts 1, 24-37) (emphasis added). Enright contends that the superseding indictment charged him only with owing taxes due and owing from PetroPlus, and that at trial there was no proof that the transactions above

PetroPlus in the daisy chain were sham transactions or that PetroPlus was responsible for the taxes. In other words, the government failed to meet its burden of proof that PetroPlus (as opposed to other companies involved in earlier transactions in the daisy chain) owed the taxes. According to Enright, this constituted a constructive amendment or variance. We do not agree with Enright's restrictive reading of the superseding indictment.

In *United States v. Wisenbaker*, the Fifth Circuit was confronted with an almost identical fact pattern. 14 F.3d 1022 (5th Cir. 1994). The defendant alleged that the indictment charged only him with tax evasion, but that the proof adduced at trial that he had assisted others, namely his customers, in evading their taxes constituted an amendment or variance. *Id.* at 1026. The indictment at issue in *Wisenbaker* read:

> [T]he defendant Houston M. Wisenbaker, Jr., did knowingly, willfully, and unlawfully attempt to evade and defeat federal excise taxes . . . by making and causing to be made false invoices; by using numerous entities to conceal the purchase of tax-free diesel fuel; by dealing in currency and cashier's checks; by failing to make a Quarterly Excise Tax Return, Form 720, . . . as required by law, with any proper officer of the Internal

> Revenue Service; and by other means.

*Id.* The Court of Appeals for the Fifth Circuit did "not find the language of the indictment susceptible to the restrictive reading [the defendant] wishe[d] to impose on [the Court]." *Id.* at 1027. As the Court explained, "[t]he indictment contains no terms restricting it to an allegation that Wisenbaker failed to pay his own taxes. It *fairly encompasses* the government's theory that Wisenbaker also violated I.R.C. § 7201 by evading any taxes his customers owed but did not pay because of Wisenbaker's false assurances that he had already paid the taxes." *Id.* (emphasis added).

As in *Wisenbaker*, each of the counts at issue (1 and 24-37) in the superseding indictment contains the phrase, ". . . the defendants . . . and others . . . did knowingly, wilfully, and unlawfully attempt to evade and defeat and aided, abetted, counseled, commanded, induced and procured and caused the evasion and defeat of federal excise taxes . . . due and owing from PetroPlus, Inc." App. at 248, 300, 302, 304, 306, 308, 310, 312-21, 323, 325, 327. What Enright fails to consider is that each count, read as a whole, "fairly encompasses" the government's theory that PetroPlus was the taxpayer, and the government did not have to prove that Enright knew that PetroPlus owed the taxes. *Wisenbaker*, 14 F.3d at 1027.

The superseding indictment is 98 pages long. App. at 236-334. It devotes 37 paragraphs to the general terms of the daisy chain scheme and all of the individuals involved. App. at 236-45. The Introduction is incorporated into the first paragraph of every count. The conspiracy count contained in Count One of the superseding indictment consists of 32 pages (143 paragraphs), detailing the acts and individuals. App. at 246-78. The tax-evasion counts span 28 pages, and are likewise filled with detailed descriptions of the individuals and their acts. App. at 300-28. Reviewed in its entirety, we can say with confidence that the superseding indictment "fairly encompasses" the government's theory that PetroPlus was the taxpayer, and Enright was properly and fairly put on notice of this allegation. All of the same arguments can be made with regard to PetroPlus as the "State of New Jersey" taxpayer, as well.[3] As discussed above, the government did not have to prove that Enright knew that PetroPlus owed the state taxes. The indictment sufficiently informed Enright of the charges against him so as to put him on notice to prepare his defense. The evidence adduced at trial constituted neither a variance from nor an amendment of the terms of the superseding indictment.

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[3] As an initial matter, Enright cites no legal authority for its argument that the government changed the identity of the state tax payer from PetroPlus to "anyone." *See* Fed. R. App. P. 28(a)(9)(A) explaining that Appellant's brief must contain the legal authorities and citations to the record upon which Appellant relies). Our analysis regarding variance and amendment applies equally to both of Enright's arguments, federal and state.

**E. Sentencing**

Enright raises several sentencing errors. We review a District Court's factual determinations underlying the application of the sentencing guidelines for clear error and exercise plenary review over legal questions involving the proper interpretation and application of the sentencing guidelines. *United States v. Helbling*, 209 F.3d 226, 242-43 (3d Cir. 2000), *cert. denied*, 531 U.S. 1100, 121 S.Ct. 833 (2001); 18 U.S.C. § 3742(e).

Enright adopts the argument of his co-Appellant, Erlikh, that the state misdemeanor conduct involved in this case did not fall near the heartland of the conduct covered by the laundering statutes. He argues that the conduct fell outside the "heartland" of money laundering, and, therefore, the District Court erred by using the money laundering guideline in calculating his sentence. Enright asserts that the District Court should have used the tax evasion guideline instead of the money laundering guideline. We do not agree. The record demonstrates that Enright was involved in an elaborate, systematic scheme to defraud. Money derived from the scheme was used to keep the daisy chain going and the links in the chain were established to avoid detection by authorities. *See generally Morelli*, 169 F.3d at 805-809. This amounted to a crime of significant duration and marked severity. The total loss to the State of New Jersey on account of the daisy chain scheme was over 11 million dollars. The daisy chain constitutes serious criminal activity

and is the conduct Congress sought to prevent when it proscribed money laundering. There was nothing "atypical" about Enright's conduct that would justify the District Court not using the money laundering guidelines. *See United States v. Chilingirian*, 280 F.3d 704, 713-14 (6th Cir. 2002).

Enright challenges the District Court's use of the 1998 Sentencing Guidelines to calculate his sentence. His argument, which consists of one paragraph in his brief and cites no authority, see Fed. R. App. P. 28(a)(9)(A) (explaining that Appellant's brief must contain the legal authorities and citations to the record upon which Appellant relies), is that the 1993 version of the Guidelines should have been used because the last tax evasion charge took place in June of 1993. The Guidelines themselves state that a court should use the "Guidelines Manual in effect on the date that the defendant is sentenced" unless there is an *ex post facto* concern. U.S.S.G. §§ 1B1.11(a), 1B1.11(b)(1). The Guidelines also state that "[i]f the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." U.S.S.G. § 1B1.11(3). Enright alleges no *ex post facto* concern, and despite his assertions to the contrary, the record reveals that Enright's tax offenses were not completed until after the effective date of the November 1993 revisions to the Guidelines. We find no error.

Enright contends that his sentence "double counts" because the District Court improperly treated the federal tax evasion scheme as a separate group from the wire-fraud and money laundering activity. By grouping the offenses into these two groups, the District Court was able to add another two levels to the total offense level. Enright argues that the District Court should have grouped the tax evasion with his wire fraud and money laundering offenses, and then should have sentenced him under the tax evasion guidelines.

The District Court did not err in its grouping decision. Under U.S.S.G. § 1B1.1(a), the District Court had to first determine the base offense level for each count. Because multiple counts were involved, the District Court had to group "closely related" counts together to determine a single offense level. U.S.S.G. § 1B1.1(d). In the case of a multiple-object conspiracy, each object offense is treated as a count of conviction. U.S.S.G. §§ 1B1.2(d), 3D1.2, comment. (n. 8). In grouping "closely related" counts, the District Court must group those counts together that involve "substantially the same harm," meaning "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss . . . or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." U.S.S.G. § 3D1.2 (d). The tax evasion guideline bases the offense level on the amount of money involved, while the guideline

for money laundering does not. *See, e.g., United States v. Napoli*, 179 F.3d 1, 10 (2d Cir. 1999), *cert. denied*, 528 U.S. 1162, 120 S.Ct. 1176 (2000); *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992). As for wire fraud, it has been found to be a crime that is "distinct from [its] underlying predicate acts and purposes and involve[s] additional harms." *See United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991). Another difference to note is the ongoing and continuous nature of the money laundering and wire fraud offenses. More distinctions exist that we need not enumerate. The District Court did not err when it determined that the tax evasion offenses did not involve substantially the same harm as the money laundering and wire fraud convictions.

Enright argues that the District Court erred by not awarding him a downward departure for acceptance of responsibility. Section 3E1.1(a) permits a district court to reduce a defendant's offense level by two points if the district court finds that "the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). Application Note 2 provides that the adjustment is not intended to "apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, comment. (n. 2). The record is clear that Enright did not demonstrate acceptance of responsibility. The trial lasted nine and a half

months, and put the government to its burden. Enright never admitted his guilt, denied any knowledge of the inner workings of the daisy scheme, and continues to deny his criminal intent to this day. The District Court gave Enright an enhancement for obstruction of justice, which according to the guidelines themselves is an indication that a defendant has not accepted responsibility for his criminal conduct. U.S.S.G. § 3E1.1 comment. (n. 4). Such events led the District Court to characterize Enright's behavior as "the dead opposite of acceptance of responsibility. It is the nonacceptance of responsibility." App. at 2647. We find no error in the District Court's refusal to grant Enright a reduction for acceptance of responsibility.

Enright also challenges the District Court's enhancement for obstruction of justice. A District Court should enhance a defendant's offense level by two if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. § 3C1.1. The record is clear Enright used offshore accounts to conceal funds and information from the I.R.S., and that Enright knew of the federal investigation into the daisy chain scheme while he used the offshore accounts. Other examples of Enright's efforts to avoid detection exist in the record as well. Enright has no authority for his proposition that the District Court was wrong to base its obstruction of justice enhancement on the overseas account

because conduct cannot be both part of the offense charged and the basis of an enhancement.[4] Enright is also without authority for his argument that because the District Court imposed a two-point increase for a sophisticated act of concealment, it was in error for the District Court to also give an enhancement for obstruction of justice.[5] We find no error with the District Court's enhancement for obstruction of justice.

Enright contends that the District Court impermissibly exceeded the 6-12 month sentence that would result from U.S.S.G. § 2S1.3 when it imposed a sentence of 100 months for Count 39 of the superseding indictment. Enright cites no authority in his one-paragraph argument on this issue,[6] and we fail to see the point of his argument. The District Court calculated Enright's combined offense level at 36, and determined that his criminal history category was I. The Guideline range was 188-235, and the District Court determined that the appropriate total term of imprisonment was 200 months. In accordance with § 5G1.2(d), the District Court distributed the 200-month sentence over the multiple convictions, several of which (including Count 39) authorized confinement for up to 120 months. See 31 U.S.C. §§ 5316(a), 5322(b). We find no error.

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[4] *See* Fed. R. App. P. 28(a)(9)(A) (explaining that Appellant's brief must contain the legal authorities and citations to the record upon which Appellant relies).

[5] *See id.*

[6] *See id.*

## III.

We have thoroughly reviewed all the arguments presented by Defendant in his submissions to this Court, and those presented at oral argument, and find no basis to disturb the multiple convictions or the sentence imposed by the District Court.[7] The judgment of conviction entered February 16, 1999 will hereby be affirmed.

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TO THE CLERK:

Please file the foregoing opinion.

/s/Robert E. Cowen

United States Circuit Judge

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[7] Enright makes a very broad argument that the conspiracy count charges are subject to the same defects as the substantive counts which he addresses throughout his brief. Brief at 79-82. As summarized in his own words, "the conviction on Count I cannot be predicated on the basis of such a general fraud-against-the-government theory in this case for three separate reasons relating to the defects in the way the substantive counts were handled below." Brief at 80. We have found no defects in how the District Court handled the substantive counts below. Further, the three additional defects identified by Enright regarding the uncertainty as to which theory the jury relied upon in convicting him of Count I are without merit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 99-5144

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UNITED STATES OF AMERICA

v.

DANIEL ENRIGHT,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 95-cr-00388-1)
District Judge: Hon. Joseph E. Irenas

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Argued March 7, 2002

Before: SCIRICA and COWEN, Circuit Judges,
RESTANI*, Judge, United States Court of International Trade

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JUDGMENT

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 7, 2002. On consideration whereof, it is now here ordered and adjudged that the judgment of the District Court entered on February 16, 1999, be and the same hereby is affirmed. All of the above in accordance with the opinion of this court.

ATTEST:

/s/ _____
Clerk

DATED: APR 18 2002

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 99-5144

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UNITED STATES OF AMERICA

v.

DANIEL ENRIGHT,

Appellant

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(D.C. Crim. No. 95-cr-00388-1)

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SUR PETITION FOR REHEARING

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Present: BECKER, Chief Judge,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, RENDELL, BARRY, AMBRO, FUENTES,
and COWEN*, Circuit Judges, and RESTANI**,
Judge, United States Court of International Trade

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* As to panel rehearing only.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT

/s/
Circuit Judge

Dated: MAY 14 2002

** The Honorable Jane A. Restani, Judge, United States Court of International Trade, who sat by designation, as to panel rehearing only.

## APPENDIX C

## United States Constitution

### Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## United States Code

### Title 18

### Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

### Section 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than

five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

**Section 1957. Engaging in monetary transactions in property derived from specified unlawful activity**

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

**Title 26**

**Section 4091. Imposition of tax**

**(a) In general.—** There is hereby imposed a tax on the sale of any taxable fuel by the producer or the importer thereof or by any producer of a taxable fuel.

**(b) Rate of tax.—**

**(1) In general.—** the rate of the tax imposed by subsection (a) shall be the sum of—

**(A)(i)** the Highway Trust Fund financing rate in the case of diesel fuel, and

**(ii)** the Airport and Airway Trust Fund financing rate in the case of aviation fuel, and

**(B)** the Leaking Underground Storage Tank Trust Fund financing rate in the case of any taxable fuel.

**(2) Highway Trust Fund financing rate.—**For purposes of paragraph (1), except as provided in subsection (c), the Highway Trust Fund financing rate is 15 cents per gallon.

**§ 4092. Definitions**

**(a) Taxable fuel.**—For purposes of this subpart—

**(1) In general.—** The term "taxable fuel" means—

**(A)** diesel fuel, and

**(B)** aviation fuel.

**§ 4093. Exemptions; special rule**

**(a) Heating oil.**—The tax imposed by section 4091 shall not apply in the case of sales of any taxable fuel which the Secretary determines is destined for use as heating oil.

**(b) Sales to producer.**—Under regulations prescribed by the Secretary, the tax imposed by section 4091 shall not apply in the case of sales of a taxable fuel to a producer of such fuel.

**(c) Exemption for nontaxable uses and bus uses.—**

**(1) In general.**—No tax shall be imposed by section 4091 on fuel sold by a producer or importer for use by the purchaser in a nontaxable use (as defined in section 6427(*l*)(2)) or a use described in section 6427(b)(1).

**Section 7201. Attempt to evade or defeat tax**

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition

to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.